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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1636

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, *et al.*,

Petitioners,

—v.—

RAILWAY EXPRESS AGENCY, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

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I.

Opinions Below

The opinion of the District Court for the Northern District of Georgia, by Judge Newell Edenfield, is reported in 306 F. Supp. 1243 and is included in Petitioners' Appendix as Appendix B.

The opinion of the Fifth Circuit Court of Appeals, by Judge Bell and concurred in by Judges Thornberry and Clark is reported in 437 F.2d 388 and is included in Petitioners' Appendix as Appendix A.

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* As of June 1, 1970, Railway Express Agency, Incorporated changed its name to REA Express, Inc.

II.

Statement of the Case

Unlike the petition for certiorari which contains factual assertions at odds with, or not supported by the record (see Attachment A hereof), the statement herein is confined to facts as determined by the District Court and affirmed by the Court of Appeals.

The circumstances leading to the instant case are simple. REA offered to let each airline at Atlanta transfer any express shipments between its own flights provided that it could do so within the next three hours (App. A-3).[1] This was done to decrease the long delay in express processing which frequently occurred at the airport (App. A-3). Delta began making such ramp transfers on June 1, 1969 (App. A-3).

The change was similar to the handling of ramp transfers elsewhere on the REA system, and REA took the position that it was entitled to take the action as a "past practice" and pursuant to the management rights clause of its collective bargaining agreement (App. A-7).

However, on June 16, the local union struck and picketed at Atlanta (App. A-4). The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), an international union which is the exclusive bargaining agent for REA employees (App. A-2), viewed the dispute as minor and instructed the local to discontinue its activities but they nevertheless continued (App. A-5). REA obtained a temporary re-

[1] References to Petitioners' Appendix will be referred to as App. A or App. B with the page number as a suffix.

straining order and on July 22, 1969, at the hearing, the parties agreed to stipulate all the relevant facts (App. A-5). The Atlanta District Court on December 8 entered a permanent injunction. Petitioners appealed the order to the Court of Appeals for the Fifth Circuit, which affirmed the decision from which Petitioners seek Certiorari.

ARGUMENT

I.

Collateral Estoppel.

In September 1970, the Special Board of Adjustment issued ten decisions in the cases of employees disciplined by REA for participating in the Atlanta strike. The Special Board found that it had jurisdiction over the matters and that the employees "participated, without legal or contractual warrant, in a course of conduct inimical to the best interest of the Company, the Union and the employees . . . [over] differences concerning the application and interpretation of the Agreement." (Award 25, Attachment B hereof. The other nine decisions are substantially similar.)

Under Section 3, First (m) of the Railway Labor Act, the awards of the Adjustment Board are final and binding upon the parties to a dispute, subject to limited judicial review common to arbitration decisions. This case is not a judicial review of the decision of the Board of Adjustment, and a collateral attack is not permissible. *Railroad Yardmasters* v. *P. & L. E. R.R.*, 39 F. Supp. 876 (N.D. Ohio 1940). The Board of Adjustment has exclusive jurisdiction over disputes concerning the application and interpretation

of the agreement. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

The decisions of the Special Board of Adjustment, the agency that has exclusive jurisdiction of this dispute, have disposed of all relevant issues of fact in this proceeding. It has decided that the union's action was an illegal strike over the interpretation of a collective bargaining agreement that discipline was warranted. (See Attachment B, p. 15.) This finding, which is binding on all parties to the decisions, including Petitioners, rejects the Petitioners' assumption that the strike was justified because of a "unilateral change in working conditions" (Question 2), that REA contracted out "work traditionally performed by its employees under the scope of their collective bargaining contract" (Question 3), and that REA contracted "out scope work" (Question 4). The issues which Petitioners seek to raise therefore are moot based on decisions of the agency having exclusive jurisdiction to make such determinations in a manner which is "final and binding" on the parties. See *Freeman on Judgments* §633, p. 1535 (5th Ed.); *Tidewater Oil Company* v. *Jackson,* 320 F.2d 157 (10th Cir. 1963), *cert. den.* 375 U.S. 942 (1963).

II.

Certiorari Should Not Be Granted to Review a Hypothetical Case.

Both courts below adequately disposed of Petitioners' contentions. The only way that Petitioners have been able to frame their questions presented is to assume facts contrary to the findings of the courts below.

The first question presupposes that there has been no "clear and express waiver by the labor organization" (Pet.,

p. 3). Yet the Court of Appeals said that "the crucial facts were stipulated by counsel" and Petitioners "appear to have waived oral testimony by witnesses" (App. A-15).

The second question assumes that this case involves "a unilateral change in working conditions" without the carrier having exerted every reasonable effort to "maintain agreements concerning rates of pay, rules, and working conditions" (Pet., p. 3). Yet the District Court found that "the primary issue is one of contract interpretation," not a change in working conditions (App. B-6), and the Court of Appeals concluded that REA had "at least the arguable right to make the transfer . . . " (App. A-8). This was confirmed by the determinations of the Special Board of Adjustment (App. B).

Petitioners' third and fourth questions (Pet., p. 4) assumed that REA contracted out "work traditionally performed by its employees under the scope of their collective bargaining contract." However, the Court of Appeals confirmed the District Court's finding that "the past practices on the national level has been for management to make air express transfer changes of the type here involved unilaterally" (App. A-8).

The foregoing findings of fact may not be set aside unless they are clearly erroneous. Fed. R. Civ. P. 52(a). See *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 at 495-6 (1950). As affirmed by the Court of Appeals, the findings became the work product of two courts, and entitled to be respected as such. Under the "two court" rule, such findings are conclusive. *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271 at 275 (1949), and cases cited therein; *Virginia Railway* v. *System Federation No. 40,* 300 U.S. 515 at 542 (1936); *Texas, New Orleans R. Co.* v. *Brotherhood of Railway Clerks,* 281 U.S. 548 at 558 (1930).

Based on the similar findings of the lower courts and of the Adjustment Board, the facts assumed by Petitioners in their questions presented are not true, and certiorari should be denied. *Stern & Gressman, Supreme Court Practice,* 140-141 (3d ed. 1962).

III.

There Is No Issue of Importance Warranting Certiorari.

The facts as found below establish that an injunction was granted on affidavits and stipulations of counsel in a minor dispute. This is not an unusual or important case. This Court has repeatedly held that such a strike may be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *L. & N.,* 373 U.S. 33 (1963); *Elgin, Joliet & E. R. Co.* v. *Burley,* 325 U.S. 711 (1945).

Further, the main petitioner in reality is a run-away local union which acted contrary to the instructions of the international, the bargaining representative (App. A-5). The local's appropriate remedy, if it believed REA had violated the Railway Labor Act, was to go to court to seek an injunction against the change. (See *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen,* 337 F.2d 127 (D.C. Cir. 1964).) Instead it chose to indulge in economic warfare in violation of the Act. Certainly this Court, with its crowded docket, should not exercise its discretion to grant certiorari in a case involving a local union which prefers to brawl rather than to resort to available legal remedies.

IV.

No Conflict in Decisions Is Involved.

No cases cited by Petitioners involve a minor dispute and hence there is no real conflict either between the Circuits or between the Fifth Circuit's decision in this case and prior Supreme Court decisions.

Chicago & N. W. R. R. Railway Co. v. *United Transportation Union,* 422 F.2d 979 (7th Cir. 1970), in which this Court has granted certiorari, is completely irrelevant. It involved the duty to bargain in a major dispute and is not at all related to the case here, which involves a minor dispute.

CONCLUSION

Certiorari should be denied and the petition dismissed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Brief in Opposition to Certiorari was mailed to Thomas W. McAliley, 1010 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and Carole A. Gardiner, 921 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, Attorneys for Petitioners, this 21st day of May, 1971.

PETER G. WOLFE

ATTACHMENT A

Errors of Fact in the Petition for Certiorari

Petition Page	Errors
7	Petitioners claim there was a "unilateral change in working conditions." The Court of Appeals specifically found that REA had "at least the arguable right to make the transfer to Delta" (App. A-8).
7	Petitioners claim that REA did not "attempt to confer with any authorized union representative about the dispute." However, the Court of Appeals found "the district court here made sufficient findings to demonstrate good faith conferring. The record amply supports this view" (App. A-12).
8	Petitioners state that they did not "waive their right to present and cross-examine live witnesses." However, the Court of Appeals stated that Petitioners "appear to have waived oral testimony by witnesses" (App. A-15).
8	Petitioners claim that there was a dispute about "the practices, if relevant, outside the five-state Gulf District." The Court of Appeals found "it is undisputed that the past practices on the national level has been for management to make air express transfer changes of the type here involved unilaterally" (App. A-8).

ATTACHMENT B

Award No. 25
Case No. 25

Special Board of Adjustment No. 752

Parties: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

and

REA Express

Statement of Claim: "Claim of District Committee of Brotherhood that:

1. The Agreement governing hours of service and working conditions between the parties, effective January 1, 1967, was violated by the Agency at Atlanta, Georgia, when on June 19, 1969, Employee W. D. Compton was held out of service pending investigation and was further violated when on July 2, 1969, he was notified by Operations Manager B. C. Henderson that he was removed from service, effective July 2, 1969, as a result of the investigation held on Friday, June 27, 1969, being allegedly charged with violation of Rule 59 and 67 of the Agency's General Rules and Instructions, and charged specifically with being absent from work on Monday,

June 16, 1969, without permission, and also charged with aiding and abetting and actively participating in an unauthorized work stoppage on Monday, June 16, 1969, and

2. That Mr. W. D. Compton shall be restored to service with seniority rights unimpaired, his record shall be cleared of the charges and he shall be compensated for all monetary loss of pay retroactive to July 2, 1969, and continuing thereafter until such time as he is restored to service, with seniority rights unimpaired, and his record cleared of the charges, and

3. Mr. Compton shall be additionally compensated for any overtime which he would have received, and any expense incurred by him due to Agency cancelling Health and Welfare Insurance Policy No. 817100 with Travellers Insurance Company, and he having to assume premium payments."

Discussion: There was an unauthorized work stoppage at the Atlanta, Georgia, Air Express Terminal from June 16 to 27, 1969. The employees took this action because the Company was permitting Delta Airline employees to handle certain "ramp shipments" allegedly in violation of the Scope Article of the Schedule Agreement as well as established local practice.

The Claimant was an employee with 25½ years seniority and a member of the Local Protective Committee. At the time of the occurrence giving rise to this claim, he was

employed as a Revision Clerk at the Atlanta Air Express Facility with his hours of assignment being 3:00 P.M. to 11:30 P.M., Monday through Friday.

The Claimant was dismissed from the Company's service as a result of an investigation held on June 27, 1969, for being absent from work without permission on June 16, 1969, and for also actively participating in an unauthorized work stoppage on the same day. The Claimant was specifically charged with violating Rules 59 and 67.

The detailed respective positions of the parties are:

COMPANY

The Company maintains that the evidence produced at the June 27, 1969, Investigation clearly established that the Claimant absented himself from work without permission on June 16, 1969, and was seen walking in a picket line wearing a placard stating that "REA Express unfair to organized labor." The Manager of the Company's Air Services also testified that he observed the Claimant adjusting the placards on the pickets as well as walking in line with them. The Company also alluded to the testimony of its supervisory staff who stated that they observed the Claimant from 6:30 P.M. to midnight talk to customers of the Company as they approached the Facility and that these customers then turned around and did not enter the offices of the Facility.

The Company stresses that there was no basis for an unauthorized work stoppage. Subsequent litigation initiated by the Company resulted in a decision by the Federal District Court for Northern Georgia holding that the dispute giving rise to the walkout was a "minor dispute" over which this Special Board of Adjustment had cognizance.

The International President of the Organization had also recognized that the walkout by the employees was illegal and a breach of the existing Schedule Agreement. The Company added that the walkout had caused it great financial loss in the amount of approximately $75,000 a day.

The Company states that there is no substance to the Organization's contention that the Investigation was unfair or prejudicial to the Claimant. It states at the Appeal Hearing it accepted statements from five employees even though these employees were available to testify at the original investigation.

The Company states that although there may have been a conflict in the testimony it was the duty and responsibility of the hearing to resolve these conflicts. It particularly notes that although the Claimant denied that he picketed the Facility at approximately 3:00 P.M. on June 16, 1969, he conceded that he did engage in picketing later (Pages 12 and 13 of Transcript of Investigation). The Company also denies that there was any breach of the Claimant's procedural rights because the officer who signed the charges against the Claimant also testified at the Investigation. The Company states that this is standard practice under the Schedule Agreement. The Company states further that it did not violate any procedural rights of the Claimant because it refused to grant a postponement of the Investigation until the work stoppage ceased. There was no justification for such a request.

The Company states that since the Claimant was a member of the Protective Committee, he had a greater responsibility than other employees in seeing that Union members committed no violation of their collective bargaining agreement.

UNION

The Organization states that the employees were unreasonably provoked because they believed the Company was contracting away their work to Delta Airline employees. It adds that it is not a complete answer for the Company to tell this Board that no REA employee lost his job as a result of awarding the work to Delta Airline employees, because as a result of the disciplinary action taken by the Company in dismissing a number of employees, it was not necessary to furlough or lay off employees.

The Organization states that if the Company had any special operational problem it could have discussed it with the General Chairman who has always listened sympathetically and who has negotiated more than 100 local agreements with the Company to meet a variety of local problems. However, the Company chose secretly to negotiate with all the airlines in the Atlanta area and persisted in giving the Union officers the "cold shoulder" and ignoring them when they sought to ascertain what developments were taking place concerning the arrangements being worked out with the several airlines. The Organization stresses that the Company was in error when they designated the arrangement effected with Delta Airlines as a "ramp transfer" Shipment because such shipments can only properly be made from one plane to another when there is no express facility available.

The Organization states that the Company singled out the Claimant because he was a member of the Protective Committee and the Manager was very hostile toward him. It states that the Claimant was the only employee cited for picketing although there were other employees engaged in similar conduct. The Organization adds that it was not a

single incident which led to the events at Atlanta but rather it was a gradual buildup of many things.

The Organization states that the Company did not prove its charges against the Claimant and that the Company witnesses were very specific at times in their testimony but could not remember other coincidental matters. It also maintains that the Investigation was not fair and impartial and the Company's witnesses were prejudiced against the Claimant. It also maintains that even if the charges were proved, the discipline imposed against the Claimant was excessive.

Findings

Findings: The Special Board, upon the whole record and all the evidence, finds that the employee and Company are Employee and Company within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds that there is adequate competent evidence to uphold a disciplinary sanction against the Claimant. The record is clear that he participated, without legal or contractual warrant, in a course of conduct which was inimical to the best interests of the Company, the Union and the employees. It should be clear at this juncture that neither the Union officers nor the rank and file may resort to direct action to enforce what they believe are valid demands. The employees through their duly designated representatives have voluntarily but solemnly entered into an agreement which provides an orderly and fair method for resolving differences concerning the application and interpretation of the Agreement. When employees ignore or

violate the grievance provisions of the Agreement they proceed at their peril.

The Board is moved to remit the dismissal of the Claimant into a suspension only because he is an employee with almost 26 years seniority and with only one prior blemish on his record—a week's suspension which occurred in 1947. There is no evidence that the Claimant participated in any form of violence to property or bodily harm to any person. It is for these reasons that the Board must hold dismissal too severe a penalty and modify it to a suspension without pay with seniority unimpaired. A suspension for more than one year in this particular case is a more commensurate disciplinary sanction.

AWARD: Claim disposed of in accordance with Findings.

/s/ JACOB SEIDENBERG
Jacob Seidenberg, Chairman and Neutral Member

.....
J. J. Callan, Company Member

.....
D. E. Watkins, Employee Member

September 10, 19[illegible]